

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Justin Sloan Medved,

Plaintiff,

v.

Sony Pictures Releasing Incorporated,

Defendant.

No. CV 15-01346-PHX-DMF

REPORT AND RECOMMENDATION

TO THE HONORABLE SUSAN R. BOLTON, U.S. DISTRICT JUDGE:

Plaintiff filed a Complaint on July 17, 2015, as well as an Application to Proceed in District Court Without Prepaying Fees or Costs (Doc. 2), and a Motion to Allow Electronic Filing by a Party Appearing Without an Attorney (Doc. 3). The Court granted Plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs (Doc. 8). On July 20, 2015, Plaintiff filed an Amended Complaint (Doc. 6). The Court must undertake a review pursuant to 28 U.S.C. § 1915(e)(2) to determine whether or not this case is properly in federal court. The review leads to the conclusion that the claims asserted in Plaintiff's Amended Complaint are not plausible and cannot be maintained under any theory of law. This Report and Recommendation is addressed to the Presiding Judge of the Phoenix Division because although this case was assigned to the undersigned judge pursuant to Local Rules of this Court, the undersigned, as a Magistrate Judge, does not have the judicial authority to enter a dispositive order absent the consent of the parties.

1 Plaintiff's Amended Complaint alleges a cause of action under 42 U.S.C. §§ 1985
2 and 1988, against Sony Pictures Releasing, Inc., for violations of his civil rights. Plaintiff
3 seeks monetary remedies for:

4 the suffering plaintiff has endured on behalf of the defendants
5 aggressive plight to appropriate plaintiff's name and distort
6 his likeness in a likeness beneficial to Michael Patrick
7 Medved and his many conspirators against plaintiff that he
8 has gained by which the subject matter of the claims made by
9 plaintiff in case numbers 2:15-cv-01291-JJT, 2:15-cv-01289-
10 SPL, and 2:15-cv-01292-ESW share relevance to this case
11 through the defamation plaintiff is suffering in each case and
12 how the aforesaid defendants in this case are catalyzing or
13 antagonizing the false and defamatory claims made against
14 plaintiff in the aforesaid case numbers through the
15 appropriation of his name and the story the aforesaid
16 defendants have built around plaintiff's defamation with the
17 film *Justin and the Knights of Valour* for the purpose of using
18 the prestige of each appropriate entity and its community
19 standing in the United States and the ethnicity of the aliens
20 companies in question who produced the film to add
21 additional damages to plaintiff's suffering in the illegal
22 campaign against Michael Patrick Medved began so long ago
23 that he is in the process of mending. The claims for relief
24 shall be taken under Civil Conspiracy, Publicity of Private
25 Life to the Public, Intentional Infliction of Emotional
26 Distress, Negligent Infliction of Emotional Distress, a claim
27 under Tort 652 C concerning the appropriation of plaintiff's
28 name and how it was used against him to cause him further
suffering in addition to the suffering described in the
aforesaid relevant cases, and fraud to the extent that the
aforesaid defendants attempt to deny such justifiable claims
and evidence brought against them and to the extent that they
violated their place in the community as entertainers and
instead served as a vindictive catalyst to one of the nastiest
defamation cases in the history of America, for such a reason
some pleadings may be brought under Rule 9(2)(b) of the
Federal Rules of Civil Procedure to the extent plaintiff needs
to explain elaborate relevance to the subject matter in cases
numbers 2:15-cv-01291-JJT, 2:15-cv-01289-SPL, and 2:15-
cv-01292-ESW and the damage he is suffering that is being
catalyzed by the aforesaid defendants through the film *Justin*

1 *and the Knights of Valour.*

2 (Doc. 6 at 4–5.)

3 Plaintiff alleges that Defendant produced and distributed a film with a main
4 character and story that appropriated Plaintiff’s name and a likeness “that is beneficial to
5 that of Michael Patrick Medved and his many conspirators against plaintiff through his
6 illegal campaign against plaintiff.” (Doc. 6 at 12.) Plaintiff alleges that he has the same
7 first name and the same physical features—red hair and blue eyes—as the main character
8 in the film *Justin and the Knights of Valour*. He also alleges that the film’s main
9 character expressed a preference to become a knight rather than a lawyer like his father,
10 just as Plaintiff had expressed a similar intention to become a lawyer until he moved from
11 Nebraska to Arizona. Many of Plaintiff’s alleged facts focus on a family dispute over his
12 inheritance of his grandfather’s rifle and his family’s preferential treatment of the
13 family’s foreign exchange students.

14 Plaintiff asserts a cause of action under 42 U.S.C. § 1985 for conspiracy to
15 interfere with his civil rights. Liberally construing Plaintiff’s Amended Complaint, he
16 asserts a claim under the first clause of § 1985(3), which provides a cause of action for a
17 private conspiracy to deprive “any person or class of persons of the equal protection of
18 the laws, or of equal privileges and immunities under the laws.” 42 U.S.C. § 1985(3).
19 “The language requiring intent to deprive of equal protection, or equal privileges and
20 immunities, means that there must be some racial, or perhaps otherwise class-based,
21 invidiously discriminatory animus behind the conspirators’ action.” *Griffin v.*
22 *Breckenridge*, 403 U.S. 88, 102 (1971). Plaintiff fails to allege race or class-based
23 animus on the part of Defendant. Plaintiff asserts that he has blue eyes and red hair, but
24 does not allege that he belongs to a race or class protected by § 1985(3) or that he was
25 treated differently than others similarly situated. *See Phelan v. Zenzen*, No. 10-cv-6704-
26 CJS, 2012 WL 5420423, at *9 (W.D.N.Y. Nov. 6, 2012) (dismissing plaintiff’s equal
27 protection claim where plaintiff, who had red hair and was Irish, did not make any
28 allegations indicating that he belonged to a protected class or that he was treated

1 differently than others similarly situated). Plaintiff fails to state a plausible claim for
2 relief under § 1985.

3 Plaintiff also asserts a cause of action for intentional infliction of emotional
4 distress. Under Arizona law, intentional infliction of emotional distress requires proof of:
5 (1) extreme and outrageous conduct; (2) intent to cause emotional distress or reckless
6 disregard of the near certainty that it will occur; and (3) severe emotional distress. *Ford v.*
7 *Revlon, Inc.*, 734 P.2d 580, 585 (Ariz. 1987) (citations omitted). To state a valid cause of
8 action, the conduct engaged in must be “so outrageous in character and so extreme in
9 degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious
10 and utterly intolerable in a civilized community.” *Mintz v. Bell Atl. Sys. Leasing Int’l,*
11 *Inc.*, 905 P.2d 559, 563 (Ariz. Ct. App. 1995) (citation omitted). Even assuming the
12 allegations in Plaintiff’s Amended Complaint are true, the alleged facts do not rise to the
13 level of being regarded as “atrocious and utterly intolerable in a civilized community,”
14 and thus do not support a claim for intentional infliction of emotional distress.

15 Plaintiff asserts a claim for negligent infliction of emotional distress. “Under
16 Arizona law, physical injury or illness is required to establish negligent infliction of
17 emotional distress.” *Adkins v. Corrections Corp. of America*, No. CV-12-1615-PHX-
18 SMM, 2015 WL 631161, at *3 (D. Ariz. Feb. 13, 2015) (finding that plaintiffs’
19 conclusory statements that they felt scared, stressed, depressed or anxious, were
20 insufficient); *see also Keck v. Jackson*, 593 P.2d 668, 669 (Ariz. 1979) (noting that
21 plaintiff’s shock or mental anguish must be manifested as a physical injury). Plaintiff has
22 not alleged the type of illness or bodily harm necessary to sustain a cause of action for
23 negligent infliction of emotional distress.

24 Plaintiff asserts a cause of action for appropriation of his name and likeness and
25 for “publicity given to private life.” Plaintiff fails to allege any specific facts suggesting
26 that his likeness was used for the main character in the film. Plaintiff’s conclusory
27 statements that his likeness was appropriated because he shares the same first name, red
28 hair and blue eyes, and has some common life events, is insufficient.

Lastly, Plaintiff alleges a cause of action for fraud. Arizona law provides two

1 types of actionable civil fraud claims—common law and constructive fraud. Common
 2 law fraud is based on a defendant’s actual intent to deceive, while constructive fraud does
 3 not require actual intent, but instead arises when a defendant breaches a legal or equitable
 4 duty. *Blau v. America’s Servicing Co.*, No. CV-08-773-PHX-MHM, 2009 WL 3174823,
 5 at *3 (D. Ariz. Sept. 29, 2009) (citations omitted). To prevail on a common law fraud
 6 claim, a plaintiff must prove:

7 (1) a representation; (2) that was false; (3) material; (4) the
 8 speaker had knowledge of its falsity or ignorance of its truth;
 9 (5) the speaker intended that it should be acted upon by the
 10 person and in the manner reasonably contemplated; (6) the
 11 listener was ignorant of its falsity; (7) relied on its truth; (8)
 such reliance was justified; and (9) the listener suffered
 consequent and proximate injury.

12 *Id.* (citation omitted). To establish constructive fraud, plaintiff must prove that:

13 (1) Defendants had a fiduciary or confidential relationship
 14 with Plaintiff that gave rise to a legal or equitable duty; (2)
 15 Defendants breached that duty; (3) the breach tends to
 16 deceive others, violates public or private confidences, or
 injures public interests; and (4) the breach induced
 detrimental and justifiable reliance.

17 *Id.* (citations omitted). Plaintiff’s allegations are insufficient to state a claim for common
 18 law fraud or constructive fraud.

19 None of Plaintiff’s causes of action are plausibly viable in light of the factual
 20 assertions set forth in the Amended Complaint and none set forth a cause of action for
 21 which relief can be granted.

22 **IT IS THEREFORE RECOMMENDED** that Justin Sloan Medved’s Amended
 23 Complaint be dismissed with prejudice.

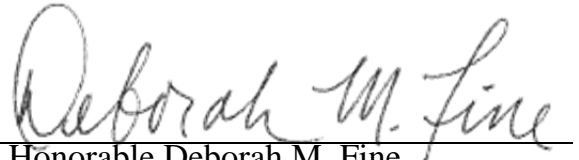
24 **IT IS FURTHER RECOMMENDED that** Justin Sloan Medved’s Motion to
 25 Allow Electronic Filing (Doc. 3) be denied as moot.

26 This recommendation is not an order that is immediately appealable to the Ninth
 27 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules
 28 of Appellate Procedure, should not be filed until entry of the district court’s judgment.

1 The parties shall have fourteen days from the date of service of a copy of this
2 recommendation within which to file specific written objections with the Court. *See*, 28
3 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter,
4 the parties have fourteen days within which to file a response to the objections. Failure
5 timely to file objections to the Magistrate Judge's Report and Recommendation may
6 result in the acceptance of the Report and Recommendation by the district court without
7 further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).
8 Failure to timely file objections to any factual determinations of the Magistrate Judge will
9 be considered a waiver of a party's right to appellate review of the findings of fact in an
10 order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Rule
11 72, Federal Rules of Civil Procedure.

12 Dated this 20th day of August, 2015.

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Honorable Deborah M. Fine
United States Magistrate Judge

cc: SRB